

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

PETER MILLER, CLIFFORD HOYT, and
CAMBRIDGE RESEARCH AND
INSTRUMENTATION, INC.

Plaintiffs,

V.

PATRICK TREADO and CHEMIMAGE CORP.

Defendants.

Case No. 05-10367 RWZ

**DEFENDANTS' MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM
IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT
(INCORPORATING MEMORANDUM IN SUPPORT THEREOF)**

Defendants Patrick Treado and ChemImage Corp. respectfully move this Court under LR 7.1(B)(4) for leave to file a Supplemental Memorandum In Opposition To Plaintiff's Motion For Leave To Amend Complaint (attached hereto as Exhibit A). As grounds for this request, Defendants state the following:

Plaintiffs filed a Motion for Leave to File an Amended Complaint [D.E. 40] on May 18, 2006. In response, Defendants filed an Opposition to Plaintiffs Motion for Leave to File an Amended Complaint [D.E. 55] on June 21, 2006.

On Monday, August 21, 2006, Plaintiffs initiated a second lawsuit against Defendants by filing a second civil action, No. 06-11479 (RWZ), against Defendants in this Court. Plaintiffs have acknowledged that the allegations in this second action are **identical** to those set forth in Plaintiffs' proposed Amended Complaint in this action:

Today, August 21, 2006, plaintiffs Cambridge Research & Instrumentation, Inc. (CRI), Peter J. Miller, and Clifford Hoyt filed a new complaint in the District Court of Massachusetts against defendants ChemImage Corporation and Patrick Treado with causes of action **identical** to the new ones in our proposed amended complaint, which is still pending.

See August 22, 2006 letter from Plaintiffs' counsel, attached as Exhibit A to Defendants' Supplemental Memorandum (emphasis added).

As a result, Defendants now seek leave to file a Supplemental Memorandum in Opposition to Plaintiff's Motion For Leave to Amend Complaint, to inform the Court of Plaintiffs' second lawsuit, which renders the motion to amend moot. In light of Plaintiffs' commencement of a second action asserting the same claims as their proposed Amended Complaint, leave to amend should be denied.

On this basis, Defendants respectfully request leave to file a Supplemental Memorandum in Opposition to Plaintiff's Motion for Leave to Amend Complaint.

Respectfully submitted,

PATRICK TREADO AND CHEMIMAGE CORP.

By their attorneys,

/s/ Anthony J. Fitzpatrick
Anthony J. Fitzpatrick (BBO # 564324)
Duane Morris LLP
470 Atlantic Avenue, Suite 500
Boston, MA 02210
Telephone: 617.289.9220
Fax: 617.289.9201
e-mail: ajfitzpatrick@duanemorris.com

Paul D. Weller (admitted *pro hac vice*)
Morgan, Lewis & Bockius, LLP
1701 Market Street
Philadelphia, PA 19103
Telephone: 215.963.5530
eFax: 215.963.5001
e-mail: pweller@morganlewis.com

August 28, 2006

LOCAL RULE 7.1 CERTIFICATION

Pursuant to 7.1(A)(2), the undersigned certifies that counsel for Defendants have attempted to confer with counsel for Plaintiffs regarding the issues raised in the foregoing motion. Plaintiffs' counsel indicated they do not consent to the motion.

/s/ Anthony J. Fitzpatrick
Anthony J. Fitzpatrick

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent to those indicated as non-registered participants on August 28, 2006.

/s/ Anthony J. Fitzpatrick
Anthony J. Fitzpatrick

**DEFENDANTS' MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM
IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT
(INCORPORATING MEMORANDUM IN SUPPORT THEREOF)**

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

PETER MILLER, CLIFFORD HOYT, and
CAMBRIDGE RESEARCH AND
INSTRUMENTATION, INC.

Plaintiffs,

v.

PATRICK TREADO and CHEMIMAGE CORP.

Defendants.

Case No. 05-10367 RWZ

**DEFENDANTS' SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT**

On August 21, 2006, Plaintiffs Cambridge Research & Instrumentation, Inc. ("CRI"), Peter J. Miller, and Clifford Hoyt (collectively, "Plaintiffs") initiated a second lawsuit against Defendants ChemImage Corporation ("ChemImage") and Patrick Treado (collectively, "Defendants") by filing a second civil action against Defendants in this Court, docketed as *Cambridge Research and Instrumentation Inc., et al. v. ChemImage Corp., et al.*, 06-CA-11479 (RWZ). Significantly, Plaintiffs have admitted that the allegations in this second action are

identical to those set forth in Plaintiffs' Proposed Amended Complaint in this action:

Today, August 21, 2006, plaintiffs Cambridge Research & Instrumentation, Inc. (CRI), Peter J. Miller, and Clifford Hoyt filed a new complaint in the District Court of Massachusetts against defendants ChemImage Corporation and Patrick Treado with causes of action **identical** to the new ones in our proposed amended complaint, which is still pending.

See August 22, 2006 letter from Plaintiffs' counsel, Exhibit A (emphasis added).

The law is clear that where, as here, a party proposes to add, by way of an amended complaint, claims that are identical to those in another pending action, leave to amend should be denied. For example, in Flintkote Co. v. Diener, 185 F. Supp. 509, 510 (D.P.R. 1960), a plaintiff proposed to add by way of an amended complaint counts which were identical to those in a second action filed by plaintiff after the filing of the original complaint. In denying the plaintiff's request for leave to amend the original complaint, the Court stated:

... Plaintiff, therefore, after serving defendant Juda Diener in this jurisdiction, requests leave to file an amended complaint which is exactly the same as another complaint in a new action instituted by it requesting the same relief ...

* * *

...as the proposed amended complaint in identical form and with the same relief requested has been filed by plaintiff in a separate action, No. 44-60, justice does not require that leave to amend be granted. Leave to amend the complaint is therefore denied.

Id. at 510 (emphasis in original). Other court have reach similar conclusions. See, e.g., Buckley Towers Condominium, Inc. v. Buchwald, 533 F.2d 934, 939 (5th Cir. 1976) (“[W]e hold that the district court did not abuse its discretion in denying the appellant’ motion to amend its complaint ... in light of commencement of a second action alleging substantially the same claims”); U.S. v. American Optical Co., 7 F.R.D. 158 (D.C.N.Y. 1945); 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1487 (2d ed. 1987) (“Applying a futility or frivolousness standard, leave has been denied when the matter asserted in the motion to amend is the subject of another action between the parties”).

If the Court were to grant Plaintiffs’ Motion for Leave to Amend, Plaintiffs would have two different actions asserting identical counts against Defendants in this Court. There is, however, no reason to permit such duplication. Thus, in view of Plaintiffs’ second civil action

against Defendants in this Court, Plaintiffs' pending Motion for Leave to Amend the Complaint should be denied.

Respectfully submitted,

PATRICK TREADO AND CHEMIMAGE CORP.

By their attorneys,

/s/ Anthony J. Fitzpatrick

Anthony J. Fitzpatrick (BBO #56324)

Duane Morris LLP

470 Atlantic Avenue, Suite 500

Boston, MA 02210

Telephone: 617.289.9220

Fax: 617.289.9201

e-mail: ajfitzpatrick@duanemorris.com

Paul D. Weller (admitted *pro hac vice*)

Morgan, Lewis & Bockius LLP

1701 Market Street

Philadelphia, PA 19103

Telephone: 215.963.5530

Fax: 215.963.5005

e-mail: pweller@morganlewis.com

August 28, 2006

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent to those indicated as non-registered participants on August 28, 2006.

/s/ Anthony J. Fitzpatrick
Anthony J. Fitzpatrick

**DEFENDANTS' SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT**

EXHIBIT A



COHEN PONTANI LIEBERMAN & PAVANE

551 Fifth Avenue, New York, NY 10176 phone 212.687.2770 fax 212.972.5487 www.cplplaw.com

Myron Cohen (1927-2005)
Thomas C. Pontani, Ph.D.
Lance J. Lieberman
Martin B. Pavane
Thomas Langer
Michael C. Stuart
William A. Alper
Edward M. Weisz
Kent H. Cheng, Ph.D.

Sidney R. Bresnick
Of Counsel

Julia S. Kim
Mindy H. Chettih
Vincent M. Fazzari
Alfred W. Froeblich
Alfred H. Hemingway, Jr.
Roger S. Thompson
Teodor J. Holmberg
Lisa A. Ferrari
Richard D. Margiano
Darren S. Mogil
David P. Badanes
Mher Hartoonian
Alphonso A. Collins
Douglas D. Zhang
Edward V. DiLello
Edward M. Reisner

Enshan Hong
Technical Advisor

August 22, 2006

VIA E-MAIL (w/some enclosures) AND FEDEX (w/all enclosures)

Anthony J. Fitzpatrick, Esq.
Duane Morris LLP
470 Atlantic Avenue, Suite 500
Boston, MA 02210

Re: Filing of NEW Complaint for
C.R.I. et al. v. ChemImage et al.
Civ. No. 06-11479-RWZ (D.Mass.)
Our File No.: 34250-66L

Dear Mr. Fitzpatrick:

Today, August 21, 2006, plaintiffs Cambridge Research & Instrumentation, Inc. (CRI), Peter J. Miller, and Clifford Hoyt filed a new complaint in the District Court of Massachusetts against defendants ChemImage Corporation and Patrick Treado with causes of action identical to the new ones in our proposed amended complaint, which is still pending.

Enclosed, find copies of the complaint, motion to impound, and exhibits as filed. Also enclosed are Notices of Lawsuit and Requests for Waiver of Service of Summons for defendants ChemImage Corporation and Patrick Treado. Please inform us at your earliest convenient whether the defendants will be signing the Waivers of Service and/or whether you will be accepting service on their behalf.

Very truly yours,
COHEN, PONTANI, LIEBERMAN & PAVANE

Martin B. Pavane

MBP/TJH/tdg

cc: Paul D. Weller, Esq.

Enc. Notices of Lawsuit and Requests for Waiver of Service of Summons/Waivers of Service
Redacted Complaint and Exhibits A-O, V, and Y-HH thereto
Motion to Impound Unredacted Complaint and some exhibits, and Exhibit 1 thereto